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Supt. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1909

No. 707

THE PRUDENTIAL INSURANCE COMPANY, APPELLANT,

vs.

BENJAMIN BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED DECEMBER 24, 1909.

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[fol. a]

IN THE SUPREME COURT OF SOUTH CAROLINA

In the Original Jurisdiction

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

against

D. D. MURPHY, as Insurance Commissioner of the State of South Carolina, Respondent

RULE TO SHOW CAUSE

[fol. 1] It appearing by the verified Petition hereto attached that a matter of large public interest is involved in this proceeding and that there are questions which should be decided promptly by this Court, it is, on motion of McKay & McKay, Attorneys for Petitioner, The Prudential Insurance Company of America,

Ordered that the Respondent, D. D. Murphy, as Insurance Commissioner of the State of South Carolina, do show cause before the Supreme Court of South Carolina on the 14 day of May 1945, why the prayer of the Petition should not be granted. It is

Further Ordered that the Respondent, D. D. Murphy, as Insurance Commissioner of the State of South Carolina, be restrained and enjoined from attempting to collect from the Petitioner the taxes involved in this proceeding or from suspending the license of the Petitioner to conduct its business in South Carolina for failure to pay such taxes, until the further Order of this Court. It is

Further Ordered that the Petitioner do within a reasonable time deposit with the Clerk of this Court its certified check in the amount of Fourteen Thousand Nine Hundred Ninety-four and 1/100 Dollars ($14,994.01), being the amount of said taxes involved, to be held pending the determination of this cause. It is

[fol. 2] Further Ordered that this cause be put down for hearing on the date above mentioned before the entire Court.

Let copies of this Rule and of the Petition be forthwith served on the Respondent, D. D. Murphy, as Insurance Com-

missioner of the State of South Carolina and on the Attorney General of the State.

T. H. Stukes, Justice, Supreme Court of South Carolina.

Manning, S. C., 29 day of March, 1945.

[fol. 3] IN SUPREME COURT OF SOUTH CAROLINA

PETITION FOR INJUNCTION AND EQUITABLE RELIEF

Now comes The Prudential Insurance Company of America, the Petitioner herein, by McKay & McKay, its attorneys, and for its cause of action herein says:

1. The Prudential Insurance Company of America (hereinafter called the "Company") is a mutual life insurance corporation organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Newark, County of Essex, State of New Jersey.

2. That the Respondent, D. D. Murphy, is the duly qualified Insurance Commissioner for the State of South Carolina, and as such is charged by law with the licensing of your Petitioner to carry on its business in the State of South Carolina, and to collect therefrom the taxes and charges hereinafter referred to.

3. The Company commenced business in 1875. It is engaged exclusively in the business of issuing all forms of life insurance, group insurance, and annuity contracts. All of the Company's activities are in furtherance of and incidental to its insurance business.

4. All the business and operations of the Company are conducted by its Board of Directors and executive management at and from its Home Office in Newark, New Jersey, and radiate from that office into all of the forty-eight states of the United States, the District of Columbia, the Territory [fol. 4] of Hawaii, and the Dominion of Canada. The Board of Directors meets only at the Home Office of the Company in New Jersey, and all the executive officers of the Company are located and act as such at said Home Office. Field representatives of the Company (by which is meant its entire agency selling force and all its representatives and em-

ployees outside its Home Office) have no authority to transact business independently on behalf of the Company, but may only take such action and perform such duties as are specifically authorized by the executive officers of the Company acting at the Home Office in New Jersey.

5. Policies insuring the lives of persons are issued by the Company at the present time in various forms, including Life, Endowment and Term insurance, and cover various fields of insurance, including Ordinary, Group and Industrial. Annuity contracts issued by the Company at the present time include both immediate and deferred annuities. On December 31, 1944, the Company had in force 33,933,077 policies, insuring approximately 22,900,000 persons, for a total amount of $22,741,134,075; and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately $63,200,000 on such lives. During the year 1944 the Company issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons, in the total amount of $2,668,714,022; and entered into 451 annuity contracts operative during the lives of approximately 600 persons and providing for an annual income of approximately $150,000 on such [fol. 5] lives. During the year 1944 the Company collected as premiums on insurance policies $681,052,095.07, and paid out as claims on policies $246,776,197.45; and it paid out $13,690,781.93 on annuity contracts.

6. The terms and conditions of all types of insurance policies and annuity contracts are determined by the officers of the Company and their assistants at the Home Office. Applications for insurance policies, annuity contracts, policy loans, modifications of contracts, and other miscellaneous matters pertaining thereto, are received by agents operating in the territory in which the applicant resides. Medical examinations and investigations of prospective risks are made by local physicians and investigators. All applications and reports are transmitted by its agents from the states in which they are received, by mail, telegraph and telephone, across state lines to the Home Office in Newark, New Jersey, where they are considered and acted upon, and where all contracts and policies are executed and issued. After issuance, policies of insurance and annuity contracts are transmitted from its Home Office across state lines to its respective agents for delivery to the insured.

7. The investments made by the Company are governed by detailed statutes of the State of New Jersey and, subject to those statutes, are rigidly controlled by the Board of Directors of the Company acting at its Home Office in New Jersey, which specifically authorizes every investment made by the Company. Such investments consist of bonds issued or guaranteed by the United States Government; bonds of [fol. 6] the various states of the United States and their political sub-divisions; bonds issued by the Dominion of Canada and its political sub-divisions; railroad, public utility and industrial bonds of corporations operating throughout the United States and Canada; preferred and common stocks of such corporations; and loans secured by mortgage on real estate located in nearly all of the states of the United States and provinces of Canada. In addition, the Company maintains cash balances in 514 banks and trust companies located throughout the United States and Dominion of Canada. All the Bank deposits hereinabove referred to are subject to the control of the Board of Directors and the executive officers of the Company acting at its Home Office in Newark, New Jersey; all the securities purchased by the Company, including mortgages but excepting (during wartime) Canadian securities, are delivered to it in the State of New Jersey and physically kept in the vaults of the Company at the Home Office in Newark, New Jersey (except securities deposited with governmental authorities as required by law or in connection with court proceedings), and are subject to the exclusive control and management of the Board of Directors and the executive officers of the Company acting at the Home Office in New Jersey. As of December 31, 1944, the assets of the Company amounted to $5,856,880,814.84.

8. The performance of the life insurance and annuity contracts, and the operation of the life insurance business of the Company in all its manifold phases, require the move- [fol. 7] ment of information, documents and money on a large scale across state lines. During the year 1944 the Company expended approximately $1,277,000 for postage, telephone, telegraph and express services, approximately $351,000 for traveling expenses, approximately $475,000 for advertising in magazines circulating throughout the United States, and approximately $900,000 in radio programs broadcast throughout the nation. Inherent in the Company's business is the continuous use of the channels of in-

terstate commerce for the transmission of such information, documents and money.

9. The Company was originally authorized to do business in the State of South Carolina, under license issued pursuant to the laws of said State, in the year 1897 and has since that time received annual renewals of its said license whereby it has been authorized to do business in the State of South Carolina up to and including March 31, 1945. On December 31, 1944, the Company maintained 4 District Offices in the State of South Carolina, employed 12 persons in said Offices and had contracts with 21 agents engaged in selling insurance therein. At that time the Company had in force 26,373 policies insuring the lives of approximately 20,000 persons resident in said State for a total amount of $30,827,184.00. During the year ending December 31, 1944, 1,439 policies insuring the lives of approximately 1,000 persons resident in said State for a total amount of $1,475,-062.00 were issued, and $457,602.28 in claims were paid on policies covering the lives of such residents. All the business in which the Company is now engaged in the State of [fol. 8], South Carolina, and all the business which the Company has done in such State in the past, has been of the nature and performed in the manner hereinabove in paragraphs numbered 1 and 3 through 8 above set forth. All such business has been and is interstate commerce.

10. Section 7948 of the Code of Laws of South Carolina, 1942, provides in substance that the Insurance Commissioner shall require each foreign Life Insurance Company "to pay as an additional and graded license fee"; 2% on "the total premiums, *i. e.*, total premium income or total premium receipts from the State, less any dividend or bonuses paid in cash or applied in abatement of premiums of such company as collected from citizens of or residents of this State during the time the Company has done business in this State since making such last return." Provided, that if a sworn statement is filed showing investment in certain South Carolina securities or property to the extent of—

"(a) ¾ of the reserve on all policies issued in South Carolina, the rate shall be 1¾%;
"(b) ½ of said reserves, 1½%;
"(c) ¾ of said reserves, 1¼%;
"(d) all of said reserves, 1%."

The same Section also provides in substance that the Insurance Commissioner shall require each foreign Health and Accident Insurance Company "to pay as an additional and graduated license fee", 2% on "the total premiums, *i. e.*, total income or total receipts from the State, less return premiums for cancellations on risks in this State dur- [fol. 9] ing the time the Company has done business in this State since such last return." Provided, that if a sworn statement is filed showing investment in certain South Carolina securities or property to the extent of—

"(a) ¼ of the premium receipts on all risks in South Carolina, the rate shall be 1¾%;
"(b) ½ of said receipts, 1½%;
"(c) ¾ of said receipts, 1¼%;
"(d) all of said receipts, 1%."

(Sec. 7948 requires semi-annual reports and payments.)

11. Section 7949 of the Code of Laws of South Carolina, 1942, provides in substance that the Insurance Commissioner of South Carolina require "all Insurance Companies doing business in this State, including all domestic companies or other companies of any class licensed by such Insurance Commissioner and not incorporated under the laws of South Carolina, to pay, in addition to the annual license fee now provided by law, a graduated licensed fee in an amount equal to 1% of the total premiums collected in the State less return premiums for cancellation on risks: Provided that the terms hereof shall not apply to domestic Insurance Companies: * * *"

"This Section shall not be construed to in any way affect or reduce the annual license fees provided to be paid under existing laws but is intended to provide for the payment of an additional fee and the proceeds to be derived from the collection thereof shall be used for State purposes."

(Sec. 7949 requires annual report and payment.)

[fol. 10] 12. The taxes provided for under Sections 7948 and 7949, referred to in the two preceding paragraphs, are levied solely against foreign Insurance Companies, domestic Insurance Companies being specifically exempted therefrom; and there are no other taxes imposed upon domestic Insurance Companies which would off-set the discrimination complained of. The taxes involved create a burden upon the business of your Petitioner, which business is

strictly interstate commerce, and discriminate against your Petitioner in favor of domestic Companies, and are illegal and void in that they violate, in part, the constitution of the State of South Carolina, and violate the Constitution of the United States in the following respects:

(1) Said sections impose a tax upon commerce between the several states of the United States, which tax constitutes a direct burden upon and interference with such commerce in violation of Article I, Section VIII, of the Constitution of the United States, which grants to Congress exclusive power to regulate commerce with foreign nations and among the several states.

(2) Said sections impose a tax upon commerce between the several states of the United States, which tax is a discrimination against such interstate commerce and against all foreign insurance companies carrying on such interstate commerce in the State of South Carolina, and is a discrimination in favor of the business of the life insurance Companies organized under the laws of the State of South Carolina, in viola- [fol. 11] tion of Article I, Section VIII, of the Constitution of the United States, which grants to Congress exclusive power to regulate commerce with foreign nations and among the several states.

(3) Said sections and the tax imposed thereby deny to Petitioner and to other foreign life insurance companies similarly situated, the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States, and of Article I, Section 5 of the Constitution of the State of South Carolina 1895.

(4) Said sections and the tax imposed thereby deprive Petitioner, and other foreign life insurance companies similarly situated, of their property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and of Article I, Section 5 of the Constitution of the State of South Carolina, 1895.

13. The discrimination which is thus made against the interstate trade and commerce of your Petitioner and other foreign Insurance Companies doing business in South Carolina, is shown by the taxes demanded of this Petitioner,

pursuant to Sections hereinabove mentioned, on its business in South Carolina, which greatly exceed the taxes required of the five most comparable domestic Insurance Companies upon comparable business. The Statement made a part hereof and attached as Exhibit "A" furnishes examples of resulting unlawful discrimination.

[fol. 12] 14. The taxes paid by your Petitioner alone to the State of South Carolina during the year 1944, under Sections of the Code herein objected to, amounted to almost fifty per cent (50%) of the total cost of operating the entire Insurance Department of the State of South Carolina for the calendar year 1944, for which the South Carolina Legislature appropriated the amount of $45,068.00, and, on information and belief, avers the same will obtain as to 1945. And further avers, on information and belief, the total tax imposed and assessed under Sections 7948 and 7949, paid in the calendar year 1944, and payable during the year 1945, was and will be many times the total cost of operating the entire Insurance Department of the State of South Carolina for the calendar years 1944 and 1945, respectively.

15. That your Petitioner would further show the Court that, as hereinabove stated, it has been duly licensed in the State of South Carolina for a long number of years to carry on its business of a foreign Insurance Company, with a number of branch offices and agents in the State of South Carolina. That it has heretofore at all times promptly paid all taxes and license fees lawfully assessed against it, but the respondent Insurance Commissioner has demanded and is required by the Sections of the Code hereinabove mentioned to demand the taxes therein provided for, and even though this Petitioner has been advised and avers that said taxes and said demands of the Insurance Commissioner are not lawful and are without warrant of law, unless [fol. 13] the demands of the Insurance Commissioner are met and the taxes paid before 31st March, 1945, your Petitioner will be denied a Certificate of Authority to do business in the State of South Carolina and thus will be irreparably damaged by virtue of such action on the part of the Respondent herein.

16. Your Petitioner is further advised and believes that there is no provision in the law of South Carolina permitting it to pay under protest the taxes demanded and to bring suit for a recovery thereof, and hence, its sole right to protection arises under the application made herein for equi-

table relief to prevent loss that will result if the demands for payment of these unlawful taxes are met, or for the irreparable damage that will ensue if it fails and refuses to pay such unlawful demands and suffers a revocation or denial of its license to carry on its business long established in the State of South Carolina.

17. That your Petitioner has filed the Returns required under Sections 7948 and 7949 of the Code, and is ready, willing and able to pay the taxes contemplated thereunder and demanded by the Respondent Insurance Commissioner, provided said taxes are lawful, and is further prepared to deposit such amount with this Court, in such form as the Court may direct, pending its decision herein.

Wherefore this Petitioner prays,

First: That the Respondent, D. D. Murphy, as Insurance Commissioner of the State of South Carolina, be enjoined and restrained, until the further Order of this Court, from [fol. 14] collecting the license fees provided for in Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, and from revoking or suspending the Certificates of Authority granted to this Company, its officers and agents, for your Petitioner's failure to pay such taxes.

Second: That this Court declare that Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, are unconstitutional, null and void in violation of the Commerce Clause of and the Fourteenth Amendment to the Constitution of the United States and of Article I, Section 5 of the Constitution of the State of South Carolina, 1895, and perpetually enjoin any attempts to enforce compliance therewith.

Third: That this Honorable Court do issue its Rule to the Respondent Insurance Commissioner to show why the relief demanded herein should not be granted, and deferentially suggests that your Petitioner be permitted in connection therewith to deposit with the Clerk of this Court its certified check or such other medium of payment or security as the Court may direct in the amount of the taxes involved to abide the determination of this cause.

Fourth: For such other and further relief as may be just and proper.

McKay & McKay, Attorneys for Petitioner.

Columbia, S. C., — March, 1945.

[fol. 15]

Exhibit "A" to Petition

Comparison of Premium and Other Taxes Paid to the State of South Carolina on 1943 and 1944 Business by the Prudential and by the Five Largest South Carolina Domestic Life Insurance Companies

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
	1943 South Carolina Premiums Column #1 Schedule T Life and Casualty*	State Premium Tax Thereon	1944 South Carolina Premiums Column #1 Schedule T Life and Casualty*	State Premium Tax Thereon	All Other State or Local Taxes Paid in 1944†	Total of Column 2 and Column 5	Total of Column 4 and Column 5
The Prudential Insurance Company of America	$858,915.82	$18,496.87	$876,305.61	$19,676.94	$3,103.92	$21,600.79	$22,780.86
Liberty Life Ins. Co.	5,339,320.20	—0—	6,164,600.50	—0—	13,178.40	13,178.40	13,178.40
Carolina Life Ins. Co.	1,748,356.86	—0—	2,028,153.03	—0—	12,171.75	12,171.75	12,171.75
Atlantic Coast Life Insurance Company	937,055.99	—0—	1,182,037.72	—0—	1,618.35	1,618.35	1,618.35
Palmetto State Life Insurance Company	931,768.12	—0—	1,014275.56 ~~1,600,275.56~~	—0—	5,960.30	5,960.30	5,960.30
Capitol Life and Health Insurance Company	500,761.13	—0—	783,675.84	—0—	2,975.18	2,975.18	2,975.18

* Figures taken from annual statement on file in South Carolina Insurance Department.

† These figures include, for the South Carolina companies, social security taxes and taxes paid in other states in which the respective companies are doing business, which your petitioner was unable to eliminate from the figures given in the annual statements. They do not include real estate taxes.

[fol. 16] *Duly sworn to by John A. Amerman. Jurat omitted in printing.*

[fols. 17-19] ACKNOWLEDGMENT OF SERVICE

Due and legal service of certified copy of Petition and Rule to Show Cause in this case acknowledged at Columbia, S. C., this 30th day of March, 1945, and such copy retained without prejudice.

(Sgd.) D. D. Murphy, Insurance Commissioner of the State of South Carolina. (Sgd.) John M. Daniel, Attorney General of the State of South Carolina.

[fol. 20] IN SUPREME COURT OF SOUTH CAROLINA

DEMURRER

The respondent, D. D. Murphy, as Insurance Commissioner of the State of South Carolina, as reply to the petition and as a return to the Rule to Show Cause herein, demurs to the petition upon the following grounds:

First

The petition fails to state a cause of action for the relief demanded in that the petition on its face shows that the petitioner is a foreign insurance company and one of a class of business corporations conducting a voluminous and profitable business within the State of South Carolina by permission of the State, a prerequisite of which is the payment of an excise or privilege tax on insurance premiums collected by it in the State of South Carolina, without the payment of such privilege tax the petitioner is not authorized to do business within the State after March 31, 1945.

Second

The petition upon its face shows that the contention of the petitioner is based upon the theory that the insurance business conducted by it is interstate commerce and that the privilege tax required of the petitioner by the State as a condition precedent to do such business, is an unlawful burden upon interstate commerce. The Court will take judicial notice of an Act of Congress passed on the 27th day of February, 1945, which declares a moratorium period

until the first day of January, 1948, during which time insurance should not be regarded as interstate commerce. The Act of Congress reads, in part, as follows:

"That the Congress hereby declares that the continued regulation and taxation by the several States [fol. 21] of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation of taxation of such business by the several States.

"Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

Third

The petition upon its face shows that there is no discrimination in the law of the State of South Carolin levying a tax upon premiums collected by the plaintiff within the State as between foreign insurance companies, and that all foreign insurance companies are required to pay the same tax in character and at the same rate.

Fourth

The petition shows on its face that this Court lacks jurisdiction in the premises for the reason that said action is one against the State of South Carolina, in that:

(a) The petitioner in paragraphs 10, 11, 13, 14 and 15 of the petition shows that the insurance Commissioner of the State of South Carolina in demanding and collecting the excise tax complained of has been and is acting pursuant to a valid statute of the State;

(b) The basis of any allegation of unlawful conduct on the part of the Commissioner is the alleged interstate commerce character of the business conducted by petitioner;

[fol. 22] (c) Under the Act of Congress passed February 27, 1945, the business of insurance has no interstate commerce characteristics so far as the taxing and regulating of insurance is concerned prior to January 1, 1948;

(d) The petitioner admits that he has paid all taxes lawfully assessed, including the excise tax on premiums on business done in this State to March 31, 1945;

(e) The petition fails to show any change in the excise tax demanded of the petitioner at this time from that which it has declared to be lawful and has paid in preceding years, and Congress having declared a moratorium against Federal interference at any time prior to January 1, 1948, the tax demanded by the Commissioner as a condition precedent to petitioner's right to do business beginning April 1, 1945, is the same status as heretofore and is lawful.

(f) An action against a State official for the doing of a lawful act under valid statutory authority is an action against the State.

(g) The petition does not show on its face that the State of South Carolina has consented to be sued in this action.

John M. Daniel, Attorney General, M. J. Hough, T. C. Callison, Assistants Attorney General, Attorneys for Respondent.

[fol. 23] I, T. C. Callison, Assistant Attorney General for the State of South Carolina, attorney for the respondent, hereby certify that the foregoing demurrer is meritorious and not interposed for the purpose of delay.

T. C. Callison, Assistant Attorney General.

April 25, 1945.

IN SUPREME COURT OF SOUTH CAROLINA

RETURN TO RULE TO SHOW CAUSE AND REPLY TO PETITION

The respondent as a reply to the petition herein, and as a return to the Rule to Show Cause, respectfully shows to the Court:

First

The respondent, on information and belief, admits the allegations of paragraphs 1, 2, 3, 4, 5 and 6 of the petition.

Second

Replying to the allegations contained in paragraphs 7, 8 and 9 of the petition, the respondent, on information and

belief admits the allegations with reference to the manner and method of conducting the business of the petitioner and admits that by the method used by the petitioner, it has accumulated great wealth and concentrated same in the State of New Jersey, and alleges that much of the accumulated wealth referred to therein has been collected from citizens of the State of South Carolina. The respondent denies that the conduct of petitioner's business constitutes interstate commerce or comes within the interstate commerce clause as related to the power and authority of the State of South Carolina, in the exercise of its police power, to tax and to [fol. 24] regulate the business of the petitioner as a foreign insurance company on the business it actually conducts within the State of South Carolina.

Third

On information and belief the respondent admits the allegations contained in paragraphs 10 and 11 of the petition and further alleges, in connection therewith, that the law of the State of South Carolina makes no distinction between foreign insurance companies in levying and collecting the privilege or excise tax referred to. All foreign insurance companies, as a class, are required to pay the tax on premiums collected in this state. The State, in the exercise of its police power, placed said tax upon the petitioner and all other foreign insurance companies as a prerequisite to extending to them the privilege of doing business in this State. Without the payment of this excise tax the petitioner is without authority to conduct any business within the State of South Carolina. Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, partly set out in said paragraphs are valid laws of the State of South Carolina which the petitioner has recognized as such and under which it has paid all taxes assessed against it through the year ending March 31, 1945, and which Sections are still valid and enforceable laws of this State.

Fourth

Replying to the allegations of the 12th paragraph of the petition, the respondent, D. D. Murphy, Insurance Commissioner of the State of South Carolina, admits that the State of South Carolina, acting within its sovereign capacity as [fol. 25] a state and in the exercise of its police power, has

under the provisions of Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, levied upon the petitioner, and all foreign insurance companies seeking to do business in the State of South Carolina, as a class, the tax therein provided for as a condition precedent to their being permitted to conduct an insurance business within the State. He admits further that said tax is not levied upon domestic insurance companies of this state, which companies constitute an entirely different class from that of foreign insurance companies doing business in this state.

The respondent denies that there is any unfair, inequitable or illegal discrimination against the petitioner or that such tax creates a burden upon interstate commerce. Petitioner shows by its petition that all of its business activities are centered within the State of New Jersey and its great amount of wealth is concentrated in said State. Its only purpose for entering the State of South Carolina to do business therein is to add to its accumulated wealth, concentrated in the State of New Jersey, from such profits as it may derive from its business in the State of South Carolina. Domestic insurance companies have their home offices in the State of South Carolina and such wealth as they accumulate is concentrated within the state and subject to all of the laws and regulations of the State of South Carolina. That the State of South Carolina, in its sovereign capacity as a state and in the exercise of its police power, has the legal and constitutional right to act for the best interests of the state to encourage the development of industries within said state, has a legal right to determine the conditions precedent for foreign insurance companies to enter the state, which right is recognized by the Congress of the United [fol. 26] States in Act passed on the 27th day of February, 1945, as shown by the following quotation from said Act:

> "That the Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.
>
> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business."

Fifth

Replying to the 13th paragraph of the petition, the respondent denies that the tax assessed against premiums on insurance collected in South Carolina by foreign insurance companies constitute illegal discrimination against such foreign corporations in favor of domestic insurance companies but alleges that the same is a fair and just privilege tax which the petitioner has paid from the time it entered the State of South Carolina to do business until the present time. The petitioner is now conducting its business of insurance within this state unlawfully and in violation of the valid statutory law of the State of South Carolina, although it is enjoying the advantages and benefits of the laws of this state and expects the laws of this state to protect its rights and interests in connection with contracts of insurance written within the state, and this it seeks to do without contributing to the revenue of the state as every other foreign insurance company doing business in this state has done.

[fol. 27]

Sixth

Replying to the 14th paragraph of the petition, the respondent, on information and belief, admits the allegations therein contained but alleges that the privilege tax charged against foreign insurance companies to do business in the State of South Carolina has no relation to the cost of the operation of the Insurance Department of the State of South Carolina, but is purely a tax assessed against said company for the privilege of doing business in the state and the revenue derived therefrom is applicable to any state use the Legislature may deem proper to apply the same to.

Seventh

Replying to the 15th paragraph of the petition, respondent admits that the petitioner has been heretofore licensed to do business in the State of South Carolina and that the petitioner has promptly paid all taxes and license fees assessed against it and that the respondent has demanded of the petitioner that it pay the taxes assessed before the 31st day of March, 1945, in order to renew its certificate of authority to do business within the state but denies that the respondent has damaged the petitioner by refusing to issue such certificate, and alleges that any

damage which the petitioner may suffer will be the result of its own conduct in refusing to pay for the right to do business within the State of South Carolina as required by the Statute in such cases made and provided.

Eighth

Replying to the remaining paragraphs of the petition, the respondent admits that there is no provision of law of [fol. 28] South Carolina permitting the petitioner to pay the premium tax referred to under protest as the only redress the state has for the non-payment of such tax is to refuse the petitioner the permit to do business within the state. The respondent denied that the petitioner is entitled to the relief sought in the premises and demands that the petitioner be required to pay the tax in question as all other foreign insurance companies have done, without which the respondent alleges that the petitioner has no authority to continue to do business within the State.

Ninth

Further replying to the petition and as a further defense thereto, the respondent alleges that this action is an action against the State of South Carolina and has been brought without obtaining the permission of the state to bring same, in that the purpose of said action is to enjoin and restrain the Insurance Commissioner of this state from performing, a purely ministerial duty under valid and constitutional law of the State of South Carolina. The petition nowhere alleges that the Commissioner is violating or has violated any law but on the contrary alleges in paragraph 15 of the petition that it has promptly paid all taxes and license fees lawfully assessed against it (which includes the premium tax provided for in Sections 7948 and 7949 of the Code); that there has been no change in the law of the State of South Carolina with reference to the levying and collection of said excise tax since the petitioner last paid the same, and the Act of Congress referred to and quoted from in paragraph 4 of this Return preserves the status of the law of each state as it relates to the power [fol. 29] and authority of the states to tax and regulate foreign insurance companies, conducting business within the several states, until the first day of January, 1948.

Tenth

That except as hereinbefore specifically admitted, all material allegations of the petition are respectfully denied.

Wherefore the respondent prays that this Return to the rule be adjudged sufficient and that the petition be dismissed and that the injunction heretofore issued be dissolved.

John M. Daniel, Attorney General, M. J. Hough, T. C. Callison, Assistants, Attorneys for Respondent.

[fol. 30] IN THE SUPREME COURT OF SOUTH CAROLINA

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Petitioner,

vs.

D. D. MURPHY, as Insurance Commissioner of the State of South Carolina, Respondent

IN THE ORIGINAL JURISDICTION

Case No. 2628

OPINION No. 15773—Filed September 13, 1945

PETITION DISMISSED

McKay & McKay, of Columbia, for petitioner.

John M. Daniel, Attorney General, M. J. Hough and T. C. Callison, Assistant Attorneys General, all of Columbia, for respondent.

Per CURIAM:

For a great many years, perforce the decision of the Supreme Court of the United States in Paul vs. State of Virginia, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357, the transaction of the business of insurance across state lines was not interstate commerce and, therefore, was not subject to the control of Congress. 29 Am. Jur., Insurance, Sec. 35. This longstanding status was upset by the result of the recent case of United States vs. Southeastern Underwriters Ass'n.,

322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440. Overruling the earlier case, the latter held that when the insurance business crosses state boundaries, it is interstate commerce. Because of the complexities and colossal nature of this far-flung business, it was feared in many quarters that considerable chaos might result from the departure of the Southeastern Underwriters decision from the former rule, but for an Act of Congress which was soon thereafter passed.

The latter is known as the McCarran Act, passed February 27, 1945, Public Law 15, 79th Congress. The portions pertinent to the present controversy are set out below:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Section 1. That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.
>
> "Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the busi- [fol. 31] ness of insurance to the extent that such business is not regulated by State law."

Unquoted Sections 3 and 4 preserve the applicability of certain provisions of the Sherman Act and the applicability of the National Labor Relations Act, the Fair Labor Standards Act and the Merchant Marine Act.

The Prudential Insurance Company of America is in this State a "foreign" life insurance company, that is, it is incorporated under the laws of New Jersey and its home office and the bulk of its property are located in the city of Newark in that State. However, it has solicited business and sold insurance contracts and policies to residents of South Carolina since the year 1897. At the end of 1944 it had in force in this State 26,373 policies insuring the lives of about twenty thousand persons for amounts aggregating over thirty million dollars; and paid claims in that year of $457,602.28 on policies covering the lives of South Carolinians. (In the face of these figures it does not appear that the tax law now resisted was "hostile in conception" or is "burdensome in result",—the words of Mr. Justice Cardozo in Baldwin vs. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032.)

The Company brought this action in the Original Jurisdiction of this Court, by permission, in attack upon the validity of the license tax of three per cent which it has heretofore paid on premiums collected here, under the provisions of the present Sections 7948 and 7949 of the South Carolina Code of Laws of 1942. While the tax is a flat one, as indicated, it is subject to a graduated reduction in proportion to the amount of certain financial investments which the company may make and report in the State of South Carolina.

It is not contended that the latter or any other feature of the law under attack is discriminatory against petitioner as compared with any other member of the class to which it belongs, to wit, "foreign" insurance companies. But it is alleged that this tax which has before been paid without protest by petitioner has become invalid, and therefore unenforceable, by reason of the law declared in the Southeastern Underwriters case, supra, in view of the Federal constitutional authorization of Congress to regulate commerce among the states, and the many decisions of the Federal Courts thereabout. It is also alleged in the petition that the tax violates a section of our State Constitution, but the point was not argued and is, therefore, deemed to have been abandoned in accord with the established rule.

Petitioner presents a two-pronged attack, first that the tax constitutes a burden upon its interstate business, transacted in part within the state, and, second, that it is discriminatory against petitioner for it is not applicable to

insurance corporations of the state, domestic companies, which are exempted from the law's provisions. The respondent, the Insurance Commissioner of the state and charged with the enforcement of the law, first contends that the proceeding is really against the State itself, which is immune from suit without its express permission. His demurrer and return also raise the other issues which will be discussed.

Disposition will be first made of the point of the respondent that the action is not maintainable because it is in reality against the State, without its permission, and, therefore, in violation of its sovereign immunity from suit. This is foreclosed by former pronouncements of this Court, in view of the fact that there is no adequate remedy at law, such as payment of the taxes under protest and suit for recovery, if they are illegally assessed. It was said in Santee River Cypress Co. vs. Query, 168 S. C. 112, 167 S. E. 22, as follows: "It is not only within the power of a Court of equity, but the duty rests upon it, to enjoin the collection of an illegal tax in those cases where no adequate legal remedy is provided for the aggrieved taxpayer. Ware Shoals Mfg. Co. vs. Jones, 72 S. C. 211, 58 S. E. 811." The eleventh amendment to the Federal Con-
[fol. 32] stitution, attempted to be invoked by respondent, is expressly applicable only to the Courts of that jurisdiction. Federal Land Bank of Columbia vs. State Highway Department, 172 S. C. 174, 173 S. E. 284. State of Missouri vs. Fiske, 290 U. S. 18, 54 S. Ct. 18, 17 L. ed. —.

We proceed then to the heart of the controversy. It is the clear intent of Congress to refrain for the present from the regulation and taxation of insurance, even as to the activities of it which undoubtedly constitute interstate commerce under the authority of United States vs. Southeastern Underwriters Ass'n, supra, with the exceptions hereinabove noted.

It would be difficult, if not impossible, to compose clearer statements than are contained in Sections 1 and 2 (a) of the McCarran Act, which are quoted again for emphasis:

> "Section 1. That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

> "Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

It should be said for a first ground for refusal of the injunction sought that, upon examination, the license tax which petitioner resists for the first time, and so far apparently alone among the many nonresident insurance companies operating in the state, may not be as burdensome as first appears, or even at all so, and may, therefore, be also non-discriminatory against a "foreign" company, such as petitioner, and in favor of a domestic (resident) company, which latter is expressly exempt from this particular tax. In this view, it is neither a burden upon interstate commerce nor discriminatory against a foreign company. Statistics are included in the petition and uncontested by the return which show the amount of the premiums tax paid by petitioner and certain taxes paid by comparable, competing domestic companies, but they confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc., taxes of a nature which petitioner pays none here which correspond. These petitioner doubtless pays in its home state of New Jersey, but not here, as do the resident companies. It does not appear in the record whether the state of New Jersey, has a similar license tax to that of South Carolina (applicable to our and other nonresident insurance companies which may do business there) to which petitioner now objects, but the tax is not at all uncommon among the states. Annotations, 49 A. L. R. 726, 77 A. L. R. 1490 and 83 A. L. R. 464.

Thus, upon the showing made, there is no merit in the contention that the tax is discriminatory for there is no proof that there is a net or real discrimination against petitioner, a foreign insurance company, as compared with a domestic one, under the tax laws of this state, to which it is subject in the conduct of its business here.

Turning to the gravamen of the complaint, that the tax being upon interstate commerce is *ipso facto* a burden thereon, irrespective of discrimination, we see no reason on the record or in argument to hold that it was not intended to be included by Congress in the "taxation by the several states of the business of insurance", which the

McCarran Act declared is in the public interest and directed that the insurance business should continue to be subject thereto.

Congress is authorized by the Constitution of the United [fol. 33] States to regulate commerce between the states. The words of that great document are quite plain thereabout, as follows: "The Congress shall have power * * * (3) To regulate commerce with foreign nations, and among the several States, and with Indian tribes." Art. 1, par. 8.

We are unable to see therein any obstacle to the course of Congress in deliberately refraining from regulation of any particular field of interstate commerce, which course is clearly charted by the McCarran Act insofar as regulation by taxation of the insurance business is concerned, unless a necessity for uniformity should require the desistance of the states. We are unable to perceive the latter condition with respect to the taxation of insurance companies. Certainly they have thriven under the existing system of state taxation. The staggering figures in the record in this case, indicating the gigantic size of petitioner's business, prove it.

It is repeated for emphasis and clarity that there is no apparent necessity for uniformity of the rate of the premium receipts tax of the various states which would invalidate (on that account alone) state legislation upon the subject, which lies in a field deliberately and advisedly unoccupied by Congressional legislative action. Kelly vs. State of Washington, 302 U. S. 1, 58 S. Ct. 87, 82 L. ed 3. It might with equal reason be contended that the property tax assessments and rates should be the same in all states, which we think has never been proposed. See, for lack of a federal question in such a tax (at the time of that decision), Continental Assur. Co. vs. Tennessee, 311 U. S. 5, 61 S. Ct. 1, 85 L. ed. 5.

There is a very long-standing precedent for the propriety and efficacy of the McCarran Act. It is found in Cooley vs. Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996. There one of the major questions was the validity of a law of Pennsylvania fixing pilotage fees (the proceeds of which were applied to the relief of indigent local pilots and their dependents) affecting ocean shipping in interstate commerce. At the first session of Congress it was enacted on Aug. 7, 1789 (1 Stat. at Large 54) that pilots should be

under the regulations of the state laws, present and future, until further legislation by Congress. Upon the strength of the latter, the local law was upheld and the Court expressly said that the grant of commercial power to Congress (the commerce clause) does not contain any terms which exclude the states from exercising authority over its subject matter. The principle of this decision is stated in the modern text of American Jurisprudence, Vol. 11, p. 18, as follows: "Strictly speaking, Congress cannot delegate to the states its power over interstate and foreign commerce. However, where the subject is one upon which the states have the power to legislate in the absence of action by Congress, it may validly be provided by Congress that state statutes shall be controlling." And see the approving citation of it in the Minnesota Rate Cases (Simpson vs. Shepard) 230 U. S. 352, 57 L. ed. 1511, 33 S. Ct. 729, 48 L. N. S. 1151, Ann. Cas. 1916A, 18.

The author of the opinion of the Court in United States vs. Southeastern Underwriters Ass'n, supra, pointed the way to the course thus far followed by Congress when he said:

> "Another reason advanced to support the result of the cases which follow Paul vs. Virginia, has been that, if any aspects of the business of insurance be treated as interstate commerce, 'then all control over it is taken from the states and the legislative regulations which this Court has heretofore sustained must be declared invalid.' Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though [fol. 34] subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the State and national interests involved can be accom-

modated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid."

From one of the supporting cases cited by the Court for the foregoing, New York Life Ins. Co. vs. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167, 56 L. ed. 332, the following is quoted:

"There are cognate cases to the cited cases, of contracts incident to commerce, but not of themselves commerce. In Williams vs. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128, there was levied by the state of Georgia a tax upon each emigrant agent or employer or employee of such agent, doing business in the state. The law imposing the tax was attacked as a violation of the commerce clause of the Constitution of the United States. Commerce was defined, quoting Mr. Justice Field, in Mobile County vs. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241, to 'consist in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.' The Court considered the definition comprehensive enough for the purpose of the case, and, testing its application, said, by Mr. Chief Justice Fuller: 'These agents were engaged in hiring laborers in Georgia, to be employed beyond the limits of the state. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation.' The conclusion was supported by cases, among others, Paul vs. Virginia and Hooper vs. California. On the authority of the same cases and New York L. Ins. Co. vs. Cravens, in Ware & Leland vs. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031, it was held that contracts by brokers for the sale of cotton for future delivery, where the transactions were closed by contracts completed and executed in one state, although the orders were received from another state, were legally subject to a tax. Such contracts, it was said, were not the subjects of interstate

commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company.'

"In Engel vs. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190, a law of New York forbade individuals or partnerships to engage in the business of receiving deposits of money for safekeeping or for the purpose of transmission to another, or for any other purpose, without a license from the comptroller. It was attacked as a violation of the commerce clause of the Constitution. The case was decided to be similar in principle to Ware & Leland vs. Mobile County and Williams vs. Fears, and the law was sustained."

In the dissenting opinion of the Chief Justice to the judgment of the majority in the Southeastern Underwriters case, he emphasized the confusion and conflict (between national and state jurisdictions) which he anticipated; but the most that he said concerning "state taxes which may now be thought to discriminate against the interstate commerce" (his words) was that they would be of seriously doubtful validity. And this was, of course, before the important enactment by Congress of the McCarran law, which was manifestly intended to allay such fears and doubts by [fol. 35] temporarily, at least, removing the grounds of them.

The old, but leading, case of Crutcher vs. Kentucky, 141 U. S. 47, 11 S. Ct. 851, 35 L. ed. 649, contains the significant statement in the opinion that is emphasized in the following quotation:

> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States, and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, *unless Congress should see fit to interpose some contrary regulation on the subject.*"

In this instance Congress has seen fit to interpose, and has interposed, a "contrary regulation on the subject" by passage of the McCarran Act which is quite simple in its effect, that is, that for the present the regulation (with

certain now irrelevant exceptions) and taxation of the interstate business of insurance shall continue by the states. The Act goes further, that any possible doubt may be removed, by the inclusion of the provision to the effect that there is no silence of Congress which might be construed to mean that this form of interstate commerce should go on without regulation or any state legislation which might be held to be a burden upon it and, therefore, in conflict with the Commerce clause of the Constitution.

Congress has plenary power over interstate commerce and we know of no legal obstacle to the exercise of it embodied in the McCarran Act. "Since the commerce clause of the Federal Constitution is not a limitation upon the power of Congress, a statute enacted by Congress, for the District of Columbia, imposing a tax upon the privilege of doing business within the district, is not subject to the objection that it interferes with or is a burden upon interstate commerce. General Electric Co. vs. District of Columbia (1940) 71 App. D. C. 321, 110 F. (2d) 261; Colgate Palmolive Peet Co. vs. District of Columbia (1940) 71 App. D. C. 324, 110 F. (2d) 264. Both of these decisions followed Neild vs. District of Columbia (1940) 71 App. D. C. 306, 110 F. (2d) 246, which involved a copartnership rather than a foreign corporation." 139 A. L. R. 951.

The brunt of petitioner's argument has been answered in what has been said, but it is incidentally also contended that the application of the tax to the premiums received by petitioner upon its South Carolina business violates the equal protection and due process clauses of the Fourteenth Amendment to the Federal constitution (which are also embraced in Art. 1, Sec. 5 of our State Constitution). But, in any view of it, it does not, under the decisions of the United States Supreme Court. There need only be cited the current case of Lincoln Nat. Life Ins. Co. vs. Read, — U. S. — 65 S. Ct. 1220, — L. ed. —, which was decided during the pendency of this proceeding.

Report of the latter case discloses that the State of Oklahoma levies a premium tax on foreign life insurance companies, similar to the tax questioned in the case at bar, imposed by the State Constitution, and the legislature increased the tax to four per cent. The plaintiff in the action was an Indiana corporation and resisted payment upon the ground that the assessment was discriminatory, because not applicable to domestic insurance companies, and is,

therefore, violative of the Fourteenth Amendment. The Court made short shrift of the contention and upheld the tax. Question was there also raised concerning a point not involved in the instant contest, to wit, that the plaintiff company was admitted to do business in the state before the statutory increase of the tax, which was, therefore, not legally applicable to it. (Hanover Fire Ins. Co. vs. Harding, 272 U. S. 494, 47 S. Ct. 179, 71 L. ed. 372, 49 A. L. R. 713.) The Court also overruled this contention, [fol. 36] upon facts similar to those of our case. But, as already stated, that point is not made in the present proceeding. It appears that the position was not taken in that case that the plaintiff was engaged in interstate commerce, and the question was not discussed, but the case was decided long after the decision in the Southeastern Underwriters Ass'n case, *and also after passage of the McCarran Act.*

Also decided after the Southeastern Underwriters Ass'n case, but apparently before the McCarran Act, was First Nat. Ben. Soc. vs. Garrison, 58 Fed. Supp. 972, in which the plaintiff, an Arizona company, challenged the validity of the California statute regulating the conduct of the insurance business in that state. Taxation was not involved but the lengthy opinion is enlightening upon the subject of the status of the law after the adjudication by the Supreme Court (in the Southeastern Underwriters case) that insurance is commerce, interstate where it crosses state lines, and in the absence of Congressional legislation. State regulation was upheld.

One of the postulates set forth in the Garrison decision, number two, is as follows: "It is a well established principle that Congress may circumscribe its regulation of interstate commerce and occupy a limited field * * *." (It is very clear to us that Congress has expressly circumscribed its regulation of the interstate business of insurance by the enactment of the provisions of the McCarran Act.) Cited with approval was another of the utterances of the Chief Justice in his dissenting opinion in the Southeastern Underwriters case (not at all, however, in conflict with the leading opinion) to the effect that the judgment of the Court in the latter case nowhere gave the slightest intimation that all state laws governing insurance companies were rendered *ipso facto* void but that such matters would have to be decided by a case-to-case determination with consideration of all the respective relevant facts and circum-

stances; and the California District Court concluded (and this was before the McCarran Act) that it is conceivable that as Congress legislates on insurance, state laws will fall, but only to the extent that they are supplemented (supplanted?) by Federal legislation, and that in the meantime state statutes will continue to control. There were further copius quotations from the opinion of Mr. Chief Justice Stone, with which this opinion need not be extended.

Upon the factual consideration aforementioned and the legal grounds stated, the petition is dismissed, the rule discharged, the temporary restraining order (heretofore issued) dissolved and permanent injunction denied.

D. Gordon Baker, C. J.; E. L. Fishburne, A. J.; T. H. Stukes, A. J.; C. A. Taylor, A. J.; G. Dewey Oxner, A. J.

[fol. 37] In the Supreme Court of South Carolina

[Title omitted]

Petition for Rehearing—Filed September 24, 1945

Your Petitioner, The Prudential Insurance Company of America, respectfully presents this Petition to The Honorable The Chief Justice and the Associate Justices of the Supreme Court of South Carolina:

That on the 13th day of September, 1945, this Honorable Court filed a *Per Curiam* Opinion denying the relief sought by your Petitioner, discharging the Rule issued, dissolving the temporary Order issued in connection therewith, and denying the permanent injunction sought; and your Petitioner, deeming that this Court in its Opinion has overlooked and misapprehended certain material matters involved, respectfully asks for a rehearing on the grounds hereinafter set forth.

The Court finds that the taxation complained of does not discriminate against your Petitioner, a foreign insurance company engaged in interstate commerce, in favor of domestic insurance companies engaged in intrastate commerce. The Opinion, on page 3, (Westbrook's Adv. Sheets 15 Sept., 1945, p. 16), says:

> "Statistics are included in the petition and uncontested by the return which show the amount of the premiums

tax paid by petitioner and certain taxes paid by comparable, competing domestic companies, but they confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.,—taxes of a nature which petitioner pays none here which correspond. These petitioner doubtless pays in its home state of New Jersey, but not here, as do the resident companies."

[fol. 38]

I:

The Court misapprehends the Facts of the Record in the Finding Upon Which it Bases its Conclusion That Sections 7948, 7949, South Carolina Code of Laws 1942, do not Discriminate Against the Petitioner, a Foreign Corporation Engaged in Interstate Commerce, in Favor of Domestic Insurance Companies, Because the Latter Pay Equivalent Taxes on Property Not Paid by Petitioner, Since Exhibit A of the Petition Shows That as to Personal Property Taxes the Petitioner Pays These in Substantial Amount, and of Course Upon the Same Basis as Such Taxes are Paid by Domestic Insurance Companies or any Other Owner Within the State of South Carolina.

Without argument, of course, and merely to amplify the factual features which cannot be comprised in detail within the composite statement of the above ground, we respectfully point out:

(a) It will be noted that Column 5 in Exhibit A of the Petition shows "*all other State or local taxes paid in 1944*" with a footnote to the effect that the only exception to the figures presented is that "they do not include real estate taxes. Hence, the taxes shown in Column 5 include, contrary to the statement in the Opinion, all personal property taxes paid by the domestic companies covering, of course, taxes on "furniture, equipment, personal property investments, etc." In addition, the figures as to domestic companies include social security taxes paid to the Federal government and taxes paid in other states in which the respective companies may be doing business.

[fol. 39] (b) It will be noted that after setting forth the items of personal property on which the Court finds

that domestic companies are paying taxes, the sentence concludes: (These are) "taxes of a nature which petitioner pays none here which correspond." Column 5 shows the item of $3103.92 paid by this petitioner on account of "all other state and local taxes paid in 1944." These taxes are of the same nature as those paid by the South Carolina companies, except that in the Prudential's instance there is no inclusion of social security taxes and taxes paid in other states. These taxes paid in South Carolina by the Prudential are comparable in amount with similar "other state and local taxes" paid by the domestic companies, being smaller than the amounts paid by three and greater than the amounts paid by two of the South Carolina companies listed. It will be observed that the figures in Column 5 vary roughly in proportion to the amount of business written by the respective companies within the state.

II

The Court's Finding of Fact That the Record Contains no Showing of Taxes Paid by Domestic Companies "on Their Home Office Buildings" is Correct, Since no Real Estate Taxes are Included. But, we Respectfully Submit, the Court is in Error in Considering Real and Personal Property Taxes Assessed Against Domestic Companies as of the Same Nature, or as Equivalent to the Premium Taxes Assessed Against Petitioner as a Foreign Insurance Company for the Privilege of Conducting its Interstate Business in South Carolina, so as to Equalize or Remove the [fol. 40] *Discrimination That Might Otherwise Obtain in the Enforcement of the Statutes Complained of*—because:

(a) The petitioner is subject to the same personal and real property taxes as the domestic companies;

(b) The petitioner, *as shown*, actually pays substantial personal property taxes;

(c) The nature of property taxes is dissimilar and not comparable to license or privilege taxes levied by the state as a condition to the right of doing business therein;

(d) Property taxes are levied and collected by County and lesser governmental units; whereas premium taxes are levied by and payable to the State.

(c) *Ad valorem* taxes on tangible property are imposed in consideration of the benefits and protection accorded the owner by the governmental unit where the property is located, whereas a privilege tax is imposed by the Sovereign State on the right to do business.

III

The Court in Considering and Determining the Existence of Corresponding or Equivalent Taxation has Injected Into This Cause an Issue That in Nowise is Warranted by the Record—because

(a) In paragraph 12 of the Petition referring to the taxes in question it is alleged: "* * * there are no other taxes imposed upon domestic Insurance Companies which would off-set the discrimination complained of." This is admitted by Respondent's demurrer and is not denied by his Reply (See Respondent's Demurrer, etc., Fourth Section, pp. 5, 6); and

(b) No evidence to sustain such issue and no argu- [fol. 41] ment relating to same has been offered by Respondent.

IV

The Court has Taken Into Consideration the Taxes Paid by Domestic Insurance Companies on "Home Office Buildings" as an Element in its Finding That Domestic Companies Pay Property Taxes Equivalent to the Premium Taxes Assessed Against Your Petitioner. We submit that it overlooks and misapprehends the following in so doing:

(a) The ownership of a home office building or of any real property is not a necessary concomitant of an insurance business;

(b) There is no evidence of any real estate ownership in the Record;

(c) There is no evidence of any kind as to what domestic insurance companies pay in real property taxes.

V

We respectfully submit, that since *the Court has Considered the Payment of Real Property Taxes by Domestic Companies as an Element to Establish the Defense of Equivalent Taxation Against the Petitioner's Charge That the Premium Taxes Imposed Upon it Constitute a Discrim-*

inatory Burden on its Interstate Business, it Should Consider What These Taxes Amount to.

From the official records of the Insurance Commissioner of the State of South Carolina, we submit the following returns as to real estate taxes paid for the year 1944 by the domestic companies listed in Exhibit A to the Petition:

[fol. 41-a] Liberty Life Insurance Co.	$4151.02
Carolina Life Ins. Co.	6486.92
Atlantic Coast Life Ins. Co.	6506.49
Palmetto State Life Ins. Co.	3258.11
Capitol Life & Health Ins. Co.	1162.23

We submit a showing from Exhibit A, with real property taxes included:

Name of Insurance Company	*Column 1* 1943 South Carolina Premiums Column 1 Schedule T Life and Casualty	*Column 7* Total Shown	Real Estate Taxes Paid For the Year 1944	Grand Total
Liberty Life	$5,339,320.20	$13,178.40	$4,151.02	$17,329.42
Carolina Life	1,748,356.86	12,171.75	6,486.92	18,658.67
Atlantic Coast Life	937,055.99	1,618.35	6,506.49	8,124.84
Palmetto State Life	931,768.12	5,960.30	3,258.11	9,218.41
Capitol Life and Health	500,761.13	2,975.18	1,162.23	4,137.41
Prudential Ins. Co. of America	858,915.82	22,780.86	—0—	22,780.86

The Prudential Insurance Company of America, with a premium collection in South Carolina of $858,915.82 (Column 1) paid in *premium taxes alone* $19,676.94. The disparity between the taxes paid by Petitioner and those paid by domestic companies becomes impressive when the item of premium collection of the respective companies is compared.

[fol. 42] For the convenience of the Court we present the following statement of percentages:

Name of Insurance Co.	Percentage Taxes per Column 7 of Exhibit A *plus* Real Estate Taxes as Related to Premium Collections Column 1, Exhibit A	Percentage Taxes per Column 7 of Exhibit A as Related to Premium Collections Column 1, Exhibit A
Liberty Life	.28	.21
Carolina Life	.92	.60
Atlantic Coast Life	.69	.14
Palmetto State Life	.87	.56
Capitol Life and Health	.53	.38
Prudential Ins. Co.	....	2.60

In conclusion your Petitioner respectfully submits that this is a cause involving questions of nationwide importance and in support of this position will ask the Honorable Court to grant it a reasonable time in which to file a short Brief of Argument to sustain same; and that it grant a rehearing.

Further, in view of the issue of equivalent taxation, raised for the first time in the Opinion, your Petitioner asks leave of the Court to file in the Record a statement of the real estate taxes paid by the domestic insurance companies listed in Exhibit A, attached to the Petition, as shown by their respective annual returns for the year 1944 filed in the office of the Insurance Commissioner of the State of South Carolina.

Respectfully Submitted, McKay & McKay, Attorneys for Petitioner.

Columbia, S. C., September 24, 1945.

[fol. 43] State of South Carolina,
County of Richland:

I, R. Beverley Herbert hereby certify that I have considered the Petition herein and there is merit in the grounds thereof. I am not concerned in this case.

A. Beverley Herbert.

Columbia, S. C., September 24, 1945.

[fol. 43a] In Supreme Court of South Carolina

Order Denying Petition for Rehearing—Filed October 22, 1945

Upon careful consideration of the within petition we find that none of the matters referred to therein was either overlooked or misapprehended by the Court in the preparation of the judgment heretofore filed; hence the petition is denied.

D. Gordon Baker, C. J.; E. L. Fishburne, A. J.; T. H. Stukes, A. J.; C. A. Taylor, A. J.; G. Dewey Oxner, A. J.

[File endorsement omitted.]

[fol. 44] IN THE SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

NOTICE OF MOTION

To the Honorable John M. Daniel, Attorney General, and The Honorables M. J. Hough and T. C. Callison, Assistant Attorneys General, Attorneys for the Respondent:

You Will Please Take Notice: That on Monday, 8th October, 1945, during the motion hour, the undersigned will move before the Supreme Court for an Order permitting the Petitioner herein to file in the record of this cause a statement of the real estate taxes paid in South Carolina by the domestic insurance companies listed in Exhibit A attached to the Petition herein, said list to be made up of figures taken from the 1944 annual returns of such companies duly filed and of record in the office of the Insurance Commissioner of the State of South Carolina, Respondent herein; reserving the right to you of filing such evidence contradicting this particular statement as may be meet and proper. Copy of Order that will be prayed for, with statement attached, is hereto annexed.

McKay & McKay, Attorneys for Petitioner.

Columbia, S. C., October 1, 1945.

[fol. 45] IN THE SUPREME COURT OF SOUTH CAROLINA

IN THE ORIGINAL JURISDICTION

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Petitioner,

against

D. D. MURPHY, as Insurance Commissioner of the State of South Carolina, Respondent

ORDER

On consideration of the application of the Petitioner herein for leave to file in the record Statement of real estate taxes paid in the State of South Carolina by domestic insurance companies listed in Exhibit A attached to the

Petition herein, as shown by their respective annual returns for 1944, filed in the office of the Insurance Commissioner for the State of South Carolina, said statement being duly certified from the office of the Insurance Commissioner and hereto attached; it is

Ordered that this motion be granted and the statement hereto attached be filed as part of the record in this cause.

Further Ordered that the Respondent herein may file such evidence contradicting this particular statement as may be meet and proper.

[fol. 46] STATEMENT

Of Real Estate Taxes Paid in the State of South Carolina by Domestic Insurance Companies Listed in Exhibit A Attached to the Petition Herein, as Shown by Their Respective Annual Returns for 1944, Filed in the Office of the Insurance Commissioner for the State of South Carolina.

Name of Company	*Real Estate Taxes Paid*
Liberty Life Insurance Co.	$4151.02
Carolina Life Insurance Co.	6486.92
Atlantic Coast Life Ins. Co.	6506.49
Palmetto State Life Ins. Co.	3258.11
Capitol Life & Health Ins. Co.	1162.23

Original Duly Certified.

[fols. 47-48] IN SUPREME COURT OF SOUTH CAROLINA

ORDER REFUSING MOTION

Motion refused.

By order of the Court.

D. Gordon Baker, Chief Justice.

10/8/45.

Due and legal service of the within Notice is hereby acknowledged and copy thereof retained at Columbia, S. C., this 2 day of October, 1945, without prejudice.

John M. Daniel, Attorneys for Respondent.

[fol. 49] IN THE SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

ORDER SUBSTITUTING PARTY RESPONDENT

It being brought to the attention of this Court that D. D. Murphy, since the rendition of final judgment in this cause has been succeeded as Insurance Commissioner of the State of South Carolina by L. George Benjamin, now, on motion of Attorneys for The Prudential Insurance Company of America, a corporation, Appellant, the Attorney General of the State of South Carolina consenting, it is

Ordered that the said L. George Benjamin, as Insurance Commissioner of the State of South Carolina, be substituted in the place of said D. D. Murphy, as Respondent in this cause.

Dated at Florence, S. C. the 19th day of November, 1945.

D. Gordon Baker, Chief Justice of the Supreme Court of South Carolina.

I consent: John M. Daniel, Attorney General of the State of South Carolina.

[fol. 50] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Justice of the Supreme Court of the State of South Carolina:

The petition of The Prudential Insurance Company of America respectfully represents:

1. Petitioner is a mutual life insurance corporation organized and existing under the laws of the State of New Jersey and is the appellant in the above-entitled cause.

2. On March 29, 1945, the petitioner filed in the Supreme Court of the State of South Carolina, a petition for a rule on D. D. Murphy, as Insurance Commissioner of the State of South Carolina, to show cause why he should not be enjoined and restrained from collecting license fees provided for in Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, and from revoking or suspending peti-

tioner's certificates of authority for its failure to pay said taxes, and on said date said Court issued the rule to show cause, as prayed for by petitioner.

[fol. 51] 3. The petitioner, after having set forth in said petition, inter alia, the nature of petitioner's insurance business, which was transacted across state lines and, as such, constituted interstate commerce, alleged in said petition that the aforesaid sections were unconstitutional and in violation, inter alia, of Article I, Section 8, Clause 3 of the Constitution of the United States, since they applied only to foreign insurance corporations while domestic insurance corporations were exempt therefrom and not subjected to any correlative or corresponding tax.

4. In accordance with said rule to show cause the petitioner deposited with the Clerk of said Court its certified check in the amount of $14,994.01 (representing the amount of taxes involved), to be held pending the determination of said cause. Subsequently the petitioner deposited with said Clerk a second certified check in the amount of $5,942.68 for the same purpose, thus increasing its total deposit as aforesaid to the sum of $20,936.69.

5. The respondent, D. D. Murphy, as Insurance Commissioner of the State of South Carolina, filed a demurrer to said petition and a return to rule to show cause and reply to petition in which, inter alia, he pleaded Public Law No. 15 (known as the Mc-Carran-Ferguson Act) as a further defense. On the basis of said pleadings, the case was submitted to the Court for its determination.

6. On September 13, 1945, the Supreme Court of the [fol. 52] State of South Carolina filed its opinion in which it upheld the constitutionality of said statutes, dismissed said petition, discharged said rule, dissolved the temporary restraining order theretofore issued, and denied a permanent injunction and on said date entered judgment in favor of the respondent as set forth in its opinion.

7. On September 24, 1945, and within the time allowed therefor, a petition for rehearing was filed by the petitioner.

8. On October 22, 1945, said petition for rehearing was denied by the Supreme Court of the State of South Carolina.

9. Subsequent to the rendition of said final judgment D. D. Murphy was succeeded as Insurance Commissioner

of the State of South Carolina by L. George Benjamin, and on November 19, 1945, on motion of attorneys for petitioner, consented to by the Attorney General of the State of South Carolina, the Supreme Court of the State of South Carolina entered an order substituting said L. George Benjamin as Insurance Commissioner of the State of South Carolina in place of D. D. Murphy as respondent in this cause.

10. The Supreme Court of the State of South Carolina is the highest court of the State of South Carolina in which a decision herein can be had.

11. In this cause there is drawn in question the validity of statutes of the State of South Carolina on the ground that said statutes, as here applied, are repugnant to the Constitution and laws of the United States, and the decision is in favor of their validity, notwithstanding your petitioner's contention that said statutes violate Article I, Section 8, Clause 3 of the Constitution of the United States.

[fol. 53] 12. Therefore, in accordance with § 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to wit, under § 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignment of Errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is also filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for an allowance of an appeal from the said Supreme Court of the State of South Carolina, the highest court of the said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the judgment of the said Supreme Court of the State of South Carolina, entered on

the 13th day of September, 1945 and made final on the 22nd day of October, 1945, by the entry of an order by that Court denying the petitioner's petition for rehearing, may be examined and reversed, and also prays that a transcript of the record, proceedings, and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of South Carolina, under his hand and seal of the [fol. 54] said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved.

Dated: November 30, 1945.

Joseph — Henderson, Douglas McKay, Attorneys for Petitioner.

[fol. 55] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The Prudential Insurance Company of America, appellant in the above-entitled cause, assigns the following errors in the record of proceedings in this case:

1. The Supreme Court of the State of South Carolina erred in failing to hold specifically that the insurance business of petitioner conducted in the manner and to the extent established in this proceeding constituted interstate commerce within the meaning of Article I, Section 8, Clause 3 of the Constitution of the United States, as heretofore determined in the case of *United States v. Southeastern Underwriters Association*, 322 U. S. 533.

2. The Supreme Court of South Carolina erred in holding that Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942 (which imposed taxes on the petitioner, a foreign insurance corporation, in the aggregate amount of three (3%) per cent of the insurance premiums received from petitioner's insurance business in South Carolina during the preceding year—less minor reductions in the [fol. 56] event of certain contingencies, the payment of which is a condition precedent to petitioner obtaining a certificate of authority to transact its insurance business in

South Carolina) did not constitute a direct and unreasonable burden upon, interference with, or a regulation of interstate commerce in the conduct of petitioner's business in violation of its right under Article I, Section 8, Clause 3 of the Constitution of the United States.

3. The Supreme Court of the State of South Carolina erred in holding that Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, did not illegally and unjustly discriminate against interstate commerce of foreign insurance companies and in favor of local commerce of South Carolina domestic insurance companies so as to violate Article I, Section 8, Clause 3 of the Constitution of the United States, especially since domestic companies are not subject to any correlative, corresponding, equivalent, or similar tax or taxes.

4. The Supreme Court of the State of South Carolina erred in holding that the aforesaid Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, were valid and not in violation of Article I, Section 8, Clause 3 of the Constitution of the United States by virtue of Public Law No. 15, 79th Congress, Chapter 20, 1st Session, known as McCarran-Ferguson Act, notwithstanding the fact that the said Act was not intended to permit, nor could it legally permit, discriminatory regulation or taxation of interstate [fol. 57] commerce in the conduct by the petitioner of its insurance business in the State of South Carolina.

5. The Supreme Court of the State of South Carolina erred in holding that the aforesaid Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, were valid and not in violation of Article I, Section 8, Clause 1 of the Constitution of the United States by virtue of Public Law No. 15, 79th Congress, Chapter 20, 1st Session, known as McCarran-Ferguson Act, notwithstanding the fact that the said Act was not intended to permit, nor could it legally permit, the imposition of unequal excise taxes in the several states.

6. The Supreme Court of the State of South Carolina erred in holding that the aforesaid Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, were valid and not in violation of Article I, Section 1, of the Constitution of the United States by virtue of Public Law No. 15, 79th Congress, Chapter 20, 1st Session, known as McCarran-

Ferguson Act, notwithstanding the fact that said Act was not intended to permit, nor could it legally permit, discriminatory regulation or taxation by the several states of interstate commerce in the conduct by the petitioner of its insurance business in the State of South Carolina.

7. The Supreme Court of the State of South Carolina erred in holding that the aforesaid Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, were valid and [fol. 58] not in violation of Fifth Amendment to the Constitution of the United States by virtue of Public Law No. 15, 79th Congress, Chapter 20, 1st Session, known as McCarran-Ferguson Act, notwithstanding the fact that the said Act was not intended to deprive the petitioner of its property without due process of law.

8. The Supreme Court of the State of South Carolina erred in stating in its opinion (a) that said premium tax is "neither a burden upon interstate commerce nor discriminatory against a foreign company", and (b) that "upon the showing made" (namely, statistics in the petition and uncontested by the return which "do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.,—taxes of a nature which petitioner pays none here which correspond") "there is no merit in the contention that the tax is discriminatory for there is no proof that there is a net or real discrimination against petitioner, a foreign insurance company, as compared with a domestic one, under the laws of this state, to which it is subject in the conduct of its business here" since said statements are contrary to and unsupported by the undisputed evidence and injected an issue in the case that was not warranted by the record and further, since not only are ad valorem property taxes paid by domestic companies neither corresponding nor correlative taxes but also, even if said property taxes be considered corresponding or cor- [fol. 59] relative taxes, there was no evidence that the amount of property taxes paid by domestic companies was sufficient to offset the discrimination of "premium taxes."

9. The Supreme Court of the State of South Carolina erred in refusing petitioner's motion for an order permitting petitioner to file in the record of this case (pending determination of its petition for rehearing) a statement of real estate taxes paid in South Carolina by domestic in-

surance companies, since said Court in its opinion had injected the issue of real estate taxes paid by domestic insurance companies.

10. The Supreme Court of the State of South Carolina erred in dismissing the petitioner's petition for injunction and equitable relief, in discharging the rule to show cause and dissolving the temporary restraining order which had heretofore been issued, and in denying a permanent injunction under which the Insurance Commissioner of the State of South Carolina would be enjoined and restrained perpetually from collecting the license fees provided for in Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, and also enjoined and restrained from revoking or suspending petitioner's certificates of authority for failure to pay such taxes since said statutes are in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, and in entering judgment against the petitioner and in favor of the defendant.

[fol. 60] Wherefore, on account of the errors hereinbefore assigned, appellant prays that said judgment of the Supreme Court of the State of South Carolina, entered in the above cause on September 13, 1945, and made final on October 22, 1945, by an order denying petition for rehearing, be reversed and entered in favor of appellant.

The Prudential Insurance Company of America; Joseph W. Henderson, 1910 Packard Building, Philadelphia 2, Pa.; Douglas McKay, Carolina Life Building, Columbia, South Carolina.

[fol. 61] In the Supreme Court of the United States

[Title omitted]

Order Allowing Appeal

The petition of The Prudential Insurance Company of America, the appellant in the above-entitled cause, for an appeal in the above case to the Supreme Court of the United States from a judgment of the Supreme Court of the State of South Carolina entered on September 13, 1945, and made final October 22, 1945, by an order denying petition for rehearing, having been filed with the Clerk of this Court and presented herein, accompanied by Assignment of Errors

and prayer for reversal, and Statement as to Jurisdiction, all as provided by the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby Allowed to the Supreme Court of the United States from the judgment of the Supreme Court of the State of South Carolina entered on September 13, 1945 and made final on October 22, 1945, by an order denying petition for rehearing, as [fol. 62] prayed for in said petition, and that the Clerk of the Supreme Court of the State of South Carolina shall, within forty (40) days of this date, make and transmit to the Supreme Court of the United States under his hand and the seal of said Court a true copy of the material parts of the record herein which shall be designated by praecipe or stipulation of the parties, or their counsel herein, all in accordance with the Rules of the Supreme Court of the United States.

It is further Ordered that the said appellant shall give a good and sufficient bond in the sum of $1,000.00 that said appellant shall prosecute said appeal to effect and answer all costs if he failed to make his plea good.

Dated: November 30, 1945.

D. Gordon Baker, Chief Justice of the Supreme Court of the State of South Carolina.

[fol. 63] Citation in usual form showing service on John M. Daniel omitted in printing.

[fol. 64] Bond on appeal for $1,000.00 approved and filed. Omitted in printing.

[fol. 65] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE INDICATING PORTIONS OF RECORD TO BE INCORPORATED INTO THE TRANSCRIPT

To the Clerk of the Supreme Court of the State of South Carolina:

In conjunction with appellant's appeal to the Supreme Court of the United States in the above-entitled cause, in which Order Allowing Appeal was issued the 30th day of

November, 1945, and on the same day filed with you, you are hereby requested to prepare, certify and transmit as part of the transcript to Clerk of the Supreme Court of the United States, in accordance with the requirements of statute and of the rules of that Court, the following:

1. Petition for injunction and equitable relief and Exhibit "A" thereto;
2. Rule to show cause;
3. Acknowledgement of service of petition and rule to show cause;
4. Demurrer;
5. Return to rule to show cause and reply to petition;
[fol. 66] 6. Opinion of Supreme Court of the State of South Carolina, filed September 13, 1945;
7. Judgment of the Supreme Court of the State of South Carolina entered in accordance with the aforesaid opinion;
8. Petition for rehearing filed September 24, 1945;
9. Notice by attorneys for petitioner dated October 1, 1945, of intention to present motion and order permitting petitioner to file statement concerning real estate taxes, and order submitted therewith, together with acknowledgement of service thereof;
10. Order of the Supreme Court of the State of South Carolina dated October 8, 1945, refusing motion to file statement concerning real estate taxes;
11. Order of the Supreme Court of the State of South Carolina dated October 22, 1945, denying petition for rehearing;
12. Order of the Supreme Court of the State of South Carolina, dated November 19, 1945, substituting L. George Benjamin, as Insurance Commissioner, as respondent in place of D. D. Murphy;
13. Petition for appeal to the Supreme Court of the United States;
14. Assignment of errors;
15. Statement as to jurisdiction;
16. Order allowing appeal;
17. Citation and service thereof;
[fol. 67] 18. Cost bond;
19. Proof of service on appellee of;
    (a) Copy of petition for appeal;
    (b) Copy of order allowing appeal;
    (c) Copy of assignment of errors;

(d) Copy of statement as to jurisdiction;

(e) Statement directing attention of the appellee to third paragraph of Rule 12 of Rules of the Supreme Court of the United States;

20. Praecipe for transcript of record; and
21. Clerk's certificate as to transcript of record.

Dated: November 30th, 1945.

Joseph W. Henderson, 1910 Packard Building, Philadelphia 2, Pa. Douglas McKay, Carolina Life Building, Columbia, South Carolina.

Service of the foregoing praecipe is hereby acknowledged this 30th day of November, 1945.

John M. Daniel, Atty. Gen. of the State of South Carolina and Atty. for Appellee.

[fol. 68] IN THE SUPREME COURT OF SOUTH CAROLINA

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Petitioner,

vs.

L. GEORGE BENJAMIN, as Insurance Commissioner of the State of South Carolina, Respondent

CERTIFICATE

I, J. B. Westbrook, Clerk of the Supreme Court of South Carolina, do hereby certify that the foregoing papers, consisting of petition for injunction and equitable relief; rule to show cause; demurrer return to rule to show cause and reply to petition; the opinion of the Supreme Court of South Carolina; and bond, are true and correct copies thereof. The opinion of the Supreme Court of South Carolina is the final judgment of the Court. The original citation with acceptance of service endorsed thereon, is herewith transmitted; the other papers attached hereto being copies of the papers set out in the praecipe, a copy of which is hereto attached.

This is the entire record in the above entitled case.

J. B. Westbrook, Clerk. (Seal.)

Columbia, South Carolina, December 6, 1945.

[fol. 69] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND APPELLANT'S DESIGNATION OF RECORD TO BE PRINTED—Filed December 31, 1945.

Comes now the appellant and adopts its Assignment of Errors as its Statement of Points to be relief upon and represents that the whole record, as filed, is necessary for the consideration of the case.

Dated the 31st day of December, 1945.

Joseph W. Henderson, 1910 Packard Building, Philadelphia, Pennsylvania; Douglas McKay, Carolina Life Building, Columbia, South Carolina, Attorneys for Appellant.

[fol. 69a] [File endorsement omitted.]

[fol. 70] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—January 28, 1946.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Jackson and Mr. Justice Rutledge took no part in the consideration of this question.

Endorsed on Cover: File No. 50,410 South Carolina, Supreme Court, Term No. 707. The Prudential Insurance Company, Appellant, vs. L. George Benjamin, as Insurance Commissioner of the State of South Carolina. Filed December 31, 1945. Term No. 707 O. T. 1945.